IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

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SUPREME COURT, U.S.

No. 74-6212

GREGORY NORTON, JR., a minor, by his next friend, Marian B. Chiles,

Appellant,

v.

CASPAR W. WEINBERGER, Secretary of Health, Education and Welfare

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

JURISDICTIONAL STATEMENT

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MARCH 18, 1975

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OPINIONS BELOW

The opinion of the single district judge on the nonconstitutional aspects of this case is reported as Norton v. Richardson, 352 F.Supp. 596 (D. Md. 1972). It is reproduced as

Appendix B, attached to this Statement. The original opinion of the three-judge district court on all aspects of this case is reported as Norton v. Weinberger, 364 F.Supp. 1117 (D. Md. 1973). It is reproduced as Appendix C, attached to this Statement. The three-judge district court's majority and dissenting opinions after this Court's remand, 418 U.S. 902 (1974), are not yet reported. They are reproduced as Appendix D, attached to this Statement.

JURISDICTION

A three-judge district court, convened pursuant to 28 U.S.C. §§2282 and 2284, entered its final judgment in this case on February 28, 1975, denying appellant's request for an order permanently enjoining enforcement of certain provisions of 42 U.S.C. §416(h)(3)(C). A copy of the judgment is attached to this Statement as Appendix E. The notice of appeal to this Court was filed on March 17, 1975. It is attached as Appendix A. This Court's jurisdiction is conferred by 28 U.S.C. §1253.

QUESTIONS PRESENTED

Where paternity is not at issue, whether the provisions of the Social Security Act which require certain illegitimate children to prove dependency on a deceased wage earner in order to qualify for social security child's insurance benefits, while irrebuttably presuming such a showing by legitimate children and another class of illegitimate children, violate the due process clause of the Fifth Amendment.

Whether appellant nevertheless factually met the statutory dependency requirement of the Act.

STATUTES INVOLVED

The relevant portions of Sections 202(d), 216(e) and 216(h) of the Social Security Act, 42 U.S.C. §§402(d), 416(e), and 416(h), were reproduced as an Appendix to the three-judge court's original opinion, attached to this Statement as Appendix C.

STATEMENT

The appellant is an illegitimate child who qualified in all respects for child's insurance benefits pursuant to Section 216(h)(3)(C) of the Social Security Act except that he was found to have failed to establish that his deceased father was living with him or contributing to his support at the time of his father's death, as required by subsection (ii) of that section, 42 U.S.C. §416(h)(3)(C)(ii). Such proof is not required, and, in fact, irrebuttably presumed, for legitimate children and certain other illegitimate children. If appellant were legitimate, or had fallen into the other classifications of illegitimate children, he would have been found eligible for child's insurance benefits and now be receiving them.

The Social Security Act sets up two categories of children with respect to proving eligibility for child's insurance benefits. To be eligible, legitimate children need merely establish that their fathers were wage earners covered by the Act and that they were their fathers' children. The Act does not require them to establish any degree of dependency on their fathers since by operation of law they are deemed to have been dependent. See 42 U.S.C. §402(d)(3).

Certain illegitimate children are also irrebuttably presumed dependent on their fathers. This presumption applies to those illegitimate children who are the children of a marriage invalid because of the existence of an impediment when the marriage ceremony was performed, see 42 U.S.C. §402(d)(3) and 416(h)(2)(B); those who establish their fathers' paternity by a written acknowledgement, court paternity decree, or court support order, see 42 U.S.C. §§402(d)(3) and 416(h)(C)(i); and those who could establish paternity under their state's intestate succession law. See Jimenez v. Weinberger, 417 U.S. 628, 631 n.2 (1974).

All other illegitimate children who have satisfactorily established their fathers' paternity are not benefited by this presumption. Instead, they must establish the additional element that they were living with or supported by their father at his death. See 42 U.S.C. §§402(d)(3)(A), 416(h)(2)(A), and 416(h)(3)(C)(ii).

Appellant was born out of wedlock to Gregory Norton, Sr., then 16, and Laurie Marie Brown, then 14. Both teenage parents were high school students living with their respective parents. They never married and never actually lived together. At Gregory, Jr.'s birth, his father "contributed $6.00 and some gifts of clothing and other baby habiliments, but never actually undertook the support of the child, being an unemployed student at the time." Norton v. Richardson, 352 F.Supp. at 600. Soon thereafter Gregory, Sr. entered the Army and, at age 19, was killed while serving in Vietnam. Although prior to his death he had made some attempts to authorize a military allotment for Gregory, Jr., this procedure was incomplete at the time of his death. See id.

Appellant's application to the Social Security Administration for child's insurance benefits on his deceased father's account was denied. Although the Administration acknowledged that appellant had established his father's paternity, it found that he had failed to prove that he had lived with or been supported by his father.

In his complaint in this action, appellant sought declaratory and injunctive relief on due process and equal protection grounds against the requirement that he and his class establish "support or living with" in addition to paternity. Alternatively, assuming the constitutionality of this extra burden on illegitimate children, appellant asserted that he in fact had met this statutory requirement.

The district judge initially assigned to the case resolved this latter nonconstitutional issue while sitting as a single district judge. He upheld the Secretary's determination that appellant's evidence was insufficient to establish that his father had lived with or supported him at the time of his death. Norton v. Richardson, 352 F.Supp. 596 (D. Md. 1972) (App. B). A three-judge court was then convened to hear the constitutional issue.

The three-judge court upheld the constitutionality of the extra-proof requirement after concluding that the purpose of the Social Security Act was to provide benefits to actual dependents of deceased wage earners and accordingly it was not improper for the Act to presume dependency for those classes most likely to have actually been dependent, while requiring actual proof of

dependency from those classes of illegitimate children less likely to have been actually dependent. The court concluded that because the dependency requirement placed on appellant's class did not lack a rational relationship to the Social Security Act's purpose or intent, it therefore was not violative of the due process clause of the Fifth Amendment. Norton v. Weinberger. 364 F.Supp. 1117 (D. Md. 1973)(App. C).

Acting on appellant's initial appeal, this Court vacated the district court's judgment and remanded the case for reconsideration in light of Jimenez v. Weinberger, 417 U.S. 628 (1974). See Norton v. Weinberger, 418 U.S. 902. Upon remand, the district court, with one judge dissenting, reaffirmed its original holding. (App. D). This appeal was then timely noted. (App. A).

THE QUESTION IS SUBSTANTIAL

Appellant submits that the district court seriously erred in interpreting a significant provision of the Social Security Act, our nation's most significant social legislation, and in applying well-established constitutional principles to its content. The impact of this decision is magnified because of its broad adverse effect on illegitimate children across the nation[1/] --a class of children who have traditionally been socially disfavored and "subjected to . . . a history of purposeful unequal treatment." Compare San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). As such, these children should "command

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1/ This case would appear to have much broader applicability than did Jimenez v. Weinberger, 417 U.S. 628 (1974), in which probable jurisdiction was noted.

extraordinary protection from the majoritarian political process." Id. Finally, this case may very well turn upon the question of the appropriate equal protection standard which must be applied to classifications discriminating against illegitimate children. The proper standard for this application is presently the subject of much confusion among federal courts. The constitutionality of these provisions presents a question of sufficient importance to warrant plenary review by this Court.

A. Contrary to the District Court Majority's Interpretation, Congress Intended Child's Insurance Benefits to Replace the Loss of the Right to Receive Support, Not Merely Actual Support

The district court held that the child's insurance benefits provisions of the Social Security Act were founded upon a concept of actual dependency: "These provisions were designed not to provide support a child never had, but to replace support lost on the death of the wage earner upon whom the child depended." (App. C at 25). The majority rejected appellant's assertion that the Act in fact merely required that an eligible child be potentially dependent or have the right to receive support from a parent, regardless of whether that parent had actually lived up to his duty. (App. D at 2 & 7).

The majority's conclusion on this issue came from a partial reading of legislative history.[2/] For unexplained reasons,

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2/ In amending the Social Security Act in 1965 to establish the disputed child's insurance provisions, the Senate Report described the Act as a "national program that is intended to pay benefits to replace the support lost by a child when his father . . . dies . . . ." S. Rep. No. 404, 89th Cong., 1st Sess. 1965 U.S. Code Cong. & Adm'n News, p. 2050, quoted in App. F.

it was not persuaded by the contrary assertion of the legislatively more crucial House-Senate Conference Committee Report, cited by this Court in Jimenez,[3/] which stated that benefits were intended "if the father was supporting the child or had a legal obligation to do so."[4/]

Appellant submits that this more significant congressional history, when read in conjunction with the entire Social Security Act, requires adherence to appellant's interpretation. At the very least, however, a substantial question is raised as to the actual meaning of these portions of the Social Security Act. This apparent clash of Congressional history should be resolved by this Court, especially in light of the humanitarian nature of the Act and the adverse impact which the district court's assertedly erroneous decision is having upon the disadvantaged class of illegitimate children.

B. No Legitimate Basis Exists for the Social Security Act's Discrimination Against Illegitimate Children

At the core of the district court's decision in upholding the constitutionality of the additional burden on illegitimate children was the notion that the Social Security Administration could fairly require proof of dependency from those more likely not to have actually been dependent, i.e., appellant's class of illegitimate children, while not requiring the same from groups

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3/ 417 U.S. at 634 n.2.

4/ House-Senate Conference Comm. Rep. on 1965 Amendments to Social Security Act, 111 Cong. Record 18387 (July 27, 1965). See App. F. The court also chose to ignore the similar thrust of the 1965 Report of the Advisory Council on Social Security which also referred to "an obligation to support" rather than actually received support. See Report of the Advisory Council on Social Security. The Status of the Social Security Program and Recommendations for Its Improvement 67 (Washington, D.C., 1965)(App. F).

more likely to have actually been dependent, e.g., all legitimate children.[5/] Accepting arguendo the court's insistence upon actual dependency as being an objective of the Act,[6/] appellant submits that there is no basis, compelling or even of a lesser stature, for the court's assumptions which led to the above reasoning. The court failed to adequately explain why illegitimate children must shoulder this extra burden while similarly situated legitimate children need not.

Although the court cited no hard evidence for its generalized assumptions, the most relevant statistical study known to counsel for appellant fails to support this notion. That study showed that 81.7% of the absent fathers of legitimate AFDC children failed to support their children, while 89.8% of the absent fathers of illegitimate AFDC children did likewise.[7/] This 8% difference

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5/ Proof of paternity, as opposed to dependency, is not at issue in this case. While appellant acknowledges that problems of proof of paternity might justify extra burdens upon illegitimates, see, e.g., Gomez v. Perez, 409 U.S. 535, 538 (1973), appellant has met the Act's requirement in this respect, see Norton v. Richardson, 352 F.Supp. at 598, and does not challenge its validity.

6/ If appellant's contrary reading of the Act's intent is accurate, the district court's "rational basis" for the Act's discrimination would, of course, evaporate.

7/ See Kaplan, Support from Absent Fathers of Children Receiving Aid to Dependent Children, 1955, U.S. Dept. of H.E.W., Social Security Adm'n, Bureau of Public Assistance at 17, 24, 35 & 39 (Washington 1960) quoted in Watts v. Veneman, 334 F.Supp. 482, 487 n.6 (D.D.C. 1971), aff'd in part, r'v'd in part, 476 F.2d 529 (D.C. Cir. 1973).

hardly seems sufficiently significant to buttress a decision to deny benefits to all illegitimate children in appellant's class.

The statutory structure presented in this case is extremely similar to that recently encountered by this Court in Frontiero v. Richardson, 411 U.S. 677 (1973). In Frontiero, male uniformed services members were entitled to claim their spouses as dependents for purposes of obtaining fringe benefits without proof of actual dependency, while female uniformed service members were forced to prove actual dependency. Thus, a male could get fringe benefits for a spouse even though that spouse was not dependent on him, while similarly situated female service members could not. This form of discrimination was ruled unconstitutional. The analogy to this case seems complete.

Appellant submits that it denies him and his class of illegitimate children fundamental fairness for Congress to permit legitimate children to receive child's insurance benefits even if they had not actually been dependent on their deceased fathers, while denying this same right to these illegitimate children. Indeed, the court's ruling has ironically singled out the class most in need of social security assistance--illegitimates whose fathers have failed to support them[8/] --and compounded their misfortune by refusing support after their fathers' deaths. Once again illegitimate children have been short-changed.

8/ As is the general rule throughout the nation, see Bridges v. Secretary of H.E.W., C.C.H. Unemployment Ins. Rptr. ¶16,480, p. 2499-463 (E.D.N.Y. Nov. 24, 1971), father in Maryland have a duty to support their illegitimate children. See Md. Code Ann., Art. 27, §88(b); Art. 16, §66A.

C. Discrimination Against Illegitimate Children Must be Given Strict Judicial Scrutiny

The district court failed to treat illegitimacy as a suspect class and thereby apply this Court's "strict scrutiny" standard to classifications discriminating against illegitimate children. (App. C at 10 & App. D at 2). Instead, it applied a variant of the "rational basis" approach and repeatedly relied upon Dandridge v. Williams, 397 U.S. 471 (1970), which was specifically rejected in Jimenez.[9/]

Discriminatory classifications against illegitimate children should encounter a most exacting standard of review. Applying the test set forth in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973), illegitimate children have surely been subjected to a history of purposeful unequal treatment and have been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." Id.

This Court has, of course, hinted that illegitimacy is to be treated as a suspect criterion. See Weber v. Aetna Casualty & Surety Co., 406 U.S. at 176 n.14 (1972); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 60 (concurring opinion); id. at 108 (dissenting opinion); Sugarman v. Dougall, 413 U.S. 634, 657 (1973)(dissenting opinion); Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

Because of the apparent decisional difficulties presented by the instant case, an accurate application of the proper equal protection standard could be critical to its outcome. Appellant

9/ Compare 417 U.S. at 632-634 with Norton v. Weinberger (App. C at & App. D at 10 n.5).

submits that because his class is being denied an important right due to a classification over which its members have no control--the status of their birth--the discriminatory classification which grants them rights inferior to those given legitimate children must be subjected to strict constitutional scrutiny.

Because no clear and unequivocal equal protection standard in this area has yet been articulated by this Court, considerable confusion has been encountered among lower courts[10/] and indeed by the majority of the district court in this case. (See App. D at 6 n.7, dissenting opinion). Clarification of the Court's position on this matter is surely needed.[11/]

D. The District Court Erred in Applying The Child's Insurance Statute To Appellant

Appellant preserves his legal assertion that, assuming the constitutional validity of the support or residency requirements of Section 216(h)(3)(C)(ii) of the Social Security Act, 42 U.S.C. §416(h)(3)(C)(ii), the district court nevertheless erred

10/ See, e.g., Miller v. Laird, 349 F.Supp. 1034, 1039-43 (D.D.C. 1972); Griffin v. Richardson, 346 F.Supp. 1226, 1232-34 (D.Md.), aff'd 409 U.S. 1069 (1972).

11/ As a three-judge district court in the District of Columbia recently stated when confronted by this same issue: "It is hoped that the Supreme Court will clarify what has become an increasingly ambigious standard of review applicable to cases such as that now before us." Severance v. Weinberger, 362 F.Supp. 1348, 1352 n.14 (D.D.C. 1973).

in not finding substantial evidence in the record to establish that appellant was supported by or lived with his deceased father. See Norton v. Richardson, 352 F.Supp. 596 (D. Md. 1972).

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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